Supreme Court of the United States.

ALBERT H. WAITE,
Petitioner,

AGAINST

THE CITY OF SANTA CRUZ,
Respondent.

No. 598.

BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF APPLICATION TO THIS COURT FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Statement of the Case.

This is an action at law brought on negotiable coupons of negotiable bonds, and also upon some of said bonds which had matured, issued by the defendant The City of Santa Cruz, California (Complaint, Record, p. 5). The case was tried before the Circuit Court without a jury, a stipulation in writing waiving a jury having been duly filed (Record, p. 33). The court found that the plaintiff was a *bona fide* holder of

the said bonds and coupons, he having acquired the same from *bona fide* purchasers thereof, who had paid value without any notice of any illegality or alleged illegality in regard to the same (Record, p. 44, Finding 12; and p. 34, Findings 1 and 2).*

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*The following banks, trust companies and individuals were, as shown by the evidence in the record (p. 173 *et seq.*), the *bona fide* purchasers of the said refunding bonds involved in the present case, and paid full value therefor, or loaned money in the usual course of business on the pledge of the said bonds as collateral security, to wit:

People's Trust Company, St. Albans, Vt., 1 bond, No. 297	$1,000
International Trust Company, Boston, Mass., 16 bonds, Nos. 10, 11, 12, 14, 91, 92, 93, 118-126 inclusive	16,000
Chapman National Bank, Portland, Me., 7 bonds, Nos. 245-251 inclusive	7,000
Wakefield Trust Company of Rhode Island, 1 bond, No. 21	1,000
National Bank of the Republic, Boston, Mass., 10 bonds, Nos. 109-117 inclusive and 72	10,000
E. G. & E. Wallace, N. H., 150 bonds, Nos. 1-8	150,000
First National Bank, Worcester, Mass., 22 bonds, Nos. 9, 13, 23, 100, 300, 301, 302, 303, 308, 309, 310, 311, 312, 325, 326, 327, 328, 343, 348, 349, 350, 351	22,000
First National Bank, Hagerstown, Md., 6 bonds, Nos.	6,000
Albany City National Bank, New York, 20 bonds, Nos. 233, 235-244 inclusive, 280-288 inclusive	20,000
First National Bank, New York, 6 bonds, Nos. 83-87 inclusive and 299	6,000
South Norwalk Savings Bank, Conn., 11 bonds, Nos. 25, 26, 95, 97, 98, 99, 154, 155, 158, 305, 306	11,000
Bank of Skaneateles, New York, 5 bonds, Nos. 102-106 inclusive	5,000
Farmers' National Bank, Mt. Holly, N. J., 4 bonds, Nos. 96, 156, 276, 313	4,000
Kenduskeag National Bank, Bangor, Me., 12 bonds, Nos. 136, 137, 138, 145, 147, 148, 149, 150, 151, 152, 153	12,000
National Bank of Waterville, New York, 1 bond, No. 360	1,000
First National Bank, Webster, Mass., 4 bonds, Nos. 22, 277, 278, 279	4,000
Martin's Bank, Ltd., London, 21 bonds, Nos. 64, 70, 82, 84, 85, 94, 95, 97, 122-124 inclusive, 184, 185, 186, 187, 188, 201-205 inclusive	21,000
Northern Counties Investment Trust, Ltd., England, 3 bonds Nos. 181, 182, 183	3,000

The Enabling Act.

The statute under which the said bonds were issued is as follows (Session Laws of California, 1893, p. 59):

"An Act to amend an Act entitled 'An Act to authorize the Common Council, Board of Trustees or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same,' approved March 15, 1883.

"*The People of the State of California, represented in Senate and Assembly, do enact as follows:*

"SECTION 1. That section one of the above-entitled Act is hereby amended to read as follows:

"SECTION 1. That whenever any incorporated city or town, other than cities of the first class, in this State, has *an outstanding indebtedness, evidenced by bonds and warrants thereof*, the common council, Board of Trustees, or other governing body thereof, shall have power to submit to the qualified electors of such city or town, at an election to be held for that purpose, the question of refunding such indebtedness. Said election shall be called and held in the same manner in which other elections are held in such city or town. The notice of such election shall recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued. Such bonds shall be of the character known as 'serials' one fortieth of the principal being payable each year, together with interest due on all sums unpaid. Said bonds may be issued in denominations not to exceed One thousand dollars, nor less than One hundred dollars; principal and interest being payable in gold coin or lawful money of the United States, and either at the office of Treasurer of such city or town, or at a designated bank situated in the cities of San Francisco, New York, Boston, or Chicago. Interest upon the same shall not exceed six per cent per annum, and may be payable semi-annually. Said bonds shall be sold in the manner provided by such city council, or other governing body, to the highest bidder, for not less than their face value, in the same character of money in

which they were payable. The proceeds of such sale shall be placed in the Treasury to the credit of the funding fund, and shall be applied only for the purpose of refunding the indebtedness for which they have been issued. Said common council, or other governing body, shall, at the time of fixing the general tax levy for each year, and in the same manner for such tax levy provided, levy and collect annually, each year, sufficient money to pay one fortieth part of the principal of such bonds, and also the annual interest upon the portion remaining unpaid.

"SEC. 2. That section two of said Act be amended so as to read as follows:

"SEC. 2. Whenever sufficient money is in the funding fund, in the hands of the treasurer, to redeem one or more of the outstanding bonds proposed to be refunded, he shall publish once a week for two weeks in some newspaper of general circulation published in such city or town, if there be any, a notice to the effect that he is prepared to pay such bond or bonds (giving the number thereof) and if the same are not presented for redemption within thirty days after the first publication of such notice, the interest on such bonds will cease. He shall, at the same time, deposit in the Post Office a copy of such notice, inclosed in a sealed envelope with the postage paid thereon, addressed to the owner or owners of such bond or bonds at the Post Office address of such owner or owners, as shown by the record thereof kept in the Treasurer's office. If such bond or bonds are not presented within the time specified in such notice, the interest thereon shall then cease, and the amount due be set aside for the payment of the same, whenever presented. All redemption of bonds shall be made according to the priority in the order of their issuance, beginning at the first number. Whenever such outstanding bonds are surrendered and paid, the Treasurer shall proceed to cancel the same by indorsing on the face thereof the amount for which they are received, the word 'canceled', and the date of cancellation. He shall also keep a record of such bonds so redeemed, and shall make a report of the same to the common council, or other governing body of such city or town, at least once a month, accompanying the same therewith by the bonds which have been taken up and canceled.

"SEC. 3. That section three of said Act be amended so as to read as follows:

"SEC. 3. All moneys which shall remain in said funding fund after all outstanding bonds as were proposed to be refunded have been taken up and canceled, shall be paid into the General Fund of such city or town, and become a part thereof.

"SEC. 4. This Act shall take effect and be in force immediately after its passage."

Approved, March 1, 1893.

Note that this statute (sec. 1, *supra*) confers upon any incorporated city or town express power to refund "an outstanding indebtedness evidenced by bonds and warrants thereof." Note also that there is nothing peculiar in this enabling statute as to the mode of exercising the express power to refund the obligations of the municipality, or as to any record to be kept by the municipality; and observe also that there is no requirement in the statute that the purchasers shall be bound to take notice of the ordinances or records of the municipality relating to the issue of the refunding bonds, which bonds the statute contemplates shall be long-time negotiable securities, and placed upon the market and sold as such.

In all these respects this case presents only the usual and ordinary case of negotiable municipal bonds, and there is absolutely nothing peculiar in this case *except the decision and judgment of the Circuit Court of Appeals.*

Copy of Bond and Coupons Involved in Present Suit.

The refunding bonds and coupons involved in the present case are in the following form (Complaint, Record, pp. 8–11; and Findings of Court, Record, p. 34 *et seq.*).

" Number. Dollars.
" ---------- $1,000.
" United States of America. State of California.
" Bond of the City of Santa Cruz. Refunding Gold Bond.
" Five per cent. Series 1.

" The City of Santa Cruz, a municipal corporation, in the county of Santa Cruz, State of California, is indebted to and promises to pay to the bearer, for value received, the sum of one thousand dollars ($1,000), gold coin of the United States, on the fifteenth day of April, A. D. 1895, with interest thereon, in like gold coin, at the rate of five (5) per cent per annum, payable annually on the fifteenth day of April, of each calendar year from the date hereof, at the office of the city treasurer of said city of Santa Cruz, on presentation and surrender of the proper interest-bearing coupon hereto attached.

" And for the payment of the principal sum herein named, and the interest accruing thereon, the said city of Santa Cruz is held and firmly bound and its faith and its and credit and all the real and personal property of said city, are hereby pledged for the prompt payment of this bond and interest at maturity.

" This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz, for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with, the provisions of an act of the legislature of the State of California, entitled 'An act to amend an act entitled "An act authorizing the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same" (approved March 15, 1883),' approved March 1, 1893.

" And in pursuance of and in conformity with the Constitution of the State of California, and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election duly and legally called and held and conducted in said city as provided under said

act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been canvassed, found and declared in the manner and as required by law.

"And it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed in legal and due form, as required by law. This bond ceases to bear interest when due, unless presented for payment.

"In testimony whereof, the said city of Santa Cruz, by its mayor and common council, has caused this bond to be signed by the mayor of said city of Santa Cruz, and attested by its said clerk, with the seal of said city attached, this sixteenth day of April, A. D. one thousand eight hundred and ninety-four.

[SEAL] WM. T. JETER.
" Mayor of the City of Santa Cruz.

" [Attest];
O. J. LINCOLN,
" City Clerk.

[ENDORSED]:

Number.....

" State of California. The City of Santa Cruz. 1000 dollars. Refunding five per cent Gold Bond.

" $1,000. $1,000.

" Series 1. Interest payable annually April 15. Principal due April 15, 1895.

" (Surcharged on face of bond) $1,000."

" $50. [COUPON]: $50.

" The city of Santa Cruz will pay to bearer hereof, on the fifteenth day of April, 1895, at the office of the city treasurer of said city, fifty dollars, gold coin of the United States, for interest on refunding bond issued sixteenth day of April, A. D. 1894.

" No.....

" WM. T. JETER,
" Mayor of the City of Santa Cruz.

" O. J. LINCOLN,
" City Clerk.

" [Surcharged *of* face of coupon]: 1."

Express Recital in Bond Fatal to the the Defense Held Good by the Circuit Court of Appeals.

Note that the bond expressly recites :

"This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz, **for the purpose of refunding the bonded indebtedness of said city** and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with, the provisions of an act of the legislature of the State of California, entitled," &c. (reciting the title of the said act of 1893 above quoted).

The City's Defense.

It was alleged as a defense to these bonds (and this was the only ground on which the Circuit Court of Appeals held them invalid) that out of the $360,000 of old bonded indebtedness authorized to be refunded the sum of $89,000 was not technically bonded indebtedness of the city of Santa Cruz, but was bonded indebtedness of a water company, the plant of which, however, had been purchased by the city *subject to a mortgage securing the said $89,000 of bonds, which bonded indebtedness of $89,000 secured by said mortgage the city had upon its purchase assumed and agreed to pay*, and in its notice of election and in its ordinance calling the election for voting on the refunding bonds, declared "*became thereby a part of the bonded indebtedness of the City of Santa Cruz*" (Record, pp. 65, 129). The Circuit Court held that this defense would be good against a purchaser of these bonds who had notice—a proposition which we dispute (see Brief hereto annexed, pp. 53–61). The Circuit Court, however, rightly held that

this defense could not be made against the *bona fide* holders of the said refunding bonds. The Circuit Court said on this point in its opinion (Record, p. 104):

"It is next insisted by defendant that Wallace & Co. [the *bona fide* purchasers of the bonds and predecessors in title to the plaintiff Waite] must be deemed to have purchased such bonds with notice that they were issued in part to refund and take up the mortgage bonds of the private corporation, because each bond contained the recital that it was issued 'in pursuance of and in conformity with the Constitution of the State of California, and the ordinances of the city of Santa Cruz.'

"The proposition for which the defendant contends upon this point is, that by this general reference to the ordinances of the city, all purchasers were put upon inquiry as to the terms of the ordinances under which the bonds were issued; and that as it appears from these ordinances that a part of the refunding issue was to be used in refunding the mortgage bonds of the private corporation, all persons purchasing the bonds are to be charged with notice of this fact. I do not think this contention can be sustained, although it is apparently supported by the case of *Post v. Pulaski County*, 49 Fed. 629, cited by the counsel for defendant.*

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* The case cited, *Post v. Pulaski County*, has been expressly overruled by the very court which originally decided it, namely, the United States Circuit Court of Appeals for the Seventh Circuit. That court said in *Wesson v. County of Saline*, 73 Fed. Rep. 917, 919 (Mr. Justice HARLAN sitting at the hearing, but not participating in the decision):

"But the proposition enunciated in *Post v. Pulaski County*, that 'the recital in the bonds that they were issued pursuant to an order of the county court put whosoever should come into possession of those bonds, even if purchased for value in the open market, upon inquiry as to the terms of that order,' is inconsistent with, and must be regarded as overruled by the recent ruling of the Supreme Court in the case of *City of Evansville v. Dennett*, *supra*, where it was held that a recital that a subscription to the stock of a railroad company was 'made in pursuance of an act of the legislature and ordinances of the city council, passed in pursuance thereof, * * * imported not only compliance with the act of the legislature, but that the ordinances of the city council were in conformity with the statute."

The recital above quoted does not stand alone. In addition to and immediately preceding it, **the bonds under consideration expressly state that they were 'issued for the purpose of refunding the bonded indebtedness' of the city of Santa Cruz, and in conformity with the act of the legislature which they recite.** The further statement, that their issuance was also in conformity with the ordinances of the city of Santa Cruz, does not detract from or modify the effect of the prior recital concerning the purpose for which the bonds were issued, and certainly cannot be construed as a warning to purchasers to examine the ordinances and determine for themselves and at their peril whether the previous representation in relation to the purpose for which the bonds were issued was true or false. On the contrary, this general reference to the ordinances of the city of Santa Cruz must be read in connection with the other parts of the instrument in which it is found, and when this is done and all the recitals are given effect, it is at once seen that they import not only that the bonds were issued in conformity with the act of the legislature, 'but that the ordinances of the city council were in conformity with the statute.'

"*Evansville v. Dennett*, 161 U. S., 434. See, also, *Hackett v. Ottawa*, 99 U. S., 86; and the well considered case of *Risley v. Village of Howell*, 64 Fed. 453."

The Circuit Court accordingly rendered judgment in favor of the plaintiff (Record, p. 79).

Decision and Judgment in Circuit Court of Appeals.

The City of Santa Cruz took a writ of error to the Circuit Court of Appeals for the Ninth Circuit, and that court by a vote of two Judges against one dissenting Judge held that, nothwithstanding these recitals in the bonds, a *bona fide* purchaser of the same was put upon notice of the ordinances and records of proceedings of the city council of the city of Santa Cruz,

and on this ground alone held that the bonds were invalid, and reversed the decision of the Circuit Court (Record p. 602).

The court held, not merely $89,000 of the refunding bonds invalid, but the whole $360,000 invalid on account of the supposed defect that $89,000 old bonds refunded were technically not bonds of the city, although even these $89,000 bonds were really indebtedness of the city and bonded indebtedness. This is monstrous injustice (see Brief hereto attached, POINT II., pp. 53-61).

The decision of the Circuit Court was given by District Judge DE HAVEN (Record, p. 81), and the decision of the Circuit Court of Appeals was given by Circuit Judge ROSS (Record, p. 577), and concurred in by District Judge HAWLEY, but Circuit Judge GILBERT dissented (Record, p. 591).

As the case now stands, therefore, two of the Judges, a Circuit Judge and a District Judge, have given opinions one way on the question involved, and two other Judges, a Circuit Judge and a District Judge, have given precisely opposite opinions in the same circuit.

Circuit Judge Ross in his opinion in the Circuit Court of Appeals says (Record, p. 577 *et seq.*):

"The statute itself was clear notice to every person that upon the records of the governing body of the city was required to be entered the specific indebtedness proposed to be refunded, together with the details of the proposed issue of refunding bonds, and that it was only for such specified indebtedness that any refunding bonds could be issued. To that record every purchaser was referred by the very act under which alone the bonds in suit were issued."

The learned Judge is demonstrably mistaken in supposing that the statute required to be entered upon the

records the specific indebtedness proposed to be refunded. A reading of the statute above quoted shows that this is not the fact. The statute only requires that "the notice of election shall recite the indebtedness to be refunded" (Sec. 1), and the statute nowhere requires that such notice of election be spread upon the records of the city. The learned Judge was mistaken, therefore, in supposing that even if a *bona fide* purchaser were put upon notice of such records he would have had constructive notice of the specific indebtedness proposed to be refunded. Of course, in any case of constructive notice, a person has constructive notice of only what is required by law to be put on a record (See cases on our brief hereto attached pp. 39-43).

But, even if the specific indebtedness to be refunded was required by the statute to be entered upon the records of the city, still a *bona fide* purchaser of these negotiable bonds with such recitals as these bonds contain would not have been put upon notice of such indebtedness.

ARGUMENT.

Evansville vs. Dennett Controlling in Present Cause.

The precise question involved in the present case has been decided by this Court in *Evansville vs. Dennett*, 161 U. S., 464, directly contrary to the opinion of the two Judges of the Circuit Court of Appeals, Ross and HAWLEY, in the present case. Mr. Justice HARLAN, giving in the case last cited the unanimous decision of this court, answered all the following ques-

tions in favor of the *bona fide* holder, to wit (pp. 439–440, 446):

"1. Does the recital in the series of bonds issued in payment of subscription to the Evansville, Henderson and Nashville Railroad Company, that they were issued in 'pursuance of an Act of the Legislature of the State of Indiana and ordinances of the City Council of said city, passed in pursuance thereof,' put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued? [No].

"2. Does the recital in the series of bonds issued to the Evansville, Carmi and Paducah Railroad Company, that they were issued 'by virtue of a resolution of said City Council passed May 23, 1870,' put a purchaser upon inquiry as to the terms of that resolution, and charge him with knowledge of its terms? [No].

"3. Do the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company, as against a *bona fide* purchaser for value of such bonds, estop the City of Evansville from asserting that such bonds were not issued, for stock subscribed, upon a petition of two-thirds of the resident freeholders of the city, distinctly setting forth the company in which stock was to be taken, and the number and amount of shares to be subscribed? [Yes].

"4. Under the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company was a *bona fide* purchaser for value put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of Evansville, freeholders of that city, that body had subscribed for stock in the said railroad company? [No].

"5. Was a *bona fide* purchaser for value of the bonds issued to the Evansville, Carmi and Paducah Railroad Company charged by the recitals in said bonds with notice that they were issued in pursuance of an invalid act, and in pursuance of an election under it [No], or had such a purchaser a right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the Common Council before the issuance of such bonds?" [Yes].

The recital in one issue of the bonds in the case of *Evansville vs. Dennett* was that they were issued "*in*

pursuance of an act of the legislature of the State of Indiana *and ordinances* of the city council of such city, passed in pursuance thereof;" and in the other issue of said bonds, "*by virtue of an act* of the general assembly of the State of Indiana entitled * * * and *by virtue of the resolution* of said city council of said city, passed October 4, 1869; * * * and *by virtue of a resolution* of said city council, passed May 23, 1870," &c. The decision of this court in said case of *Evansville vs. Dennett* was that this recital in the bonds of a particular resolution specifically by date "*did not put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms.*" Much less does the recital generally that a bond is issued in pursuance of an ordinance put the *bona fide* purchaser of such negotiable bonds upon inquiry as to the terms of such ordinance.

The statement of Circuit Judge Ross in the opinion of the two Judges of the Circuit Court of Appeals in the present case that "such bodies [as city councils] can only act by order, ordinance, or resolution, as every one is bound to know," was equally true in the case of *Evansville vs. Dennett;* and not only so, but it was expressly recited in the bonds in *Evansville vs. Dennett* that such action had been by ordinance and resolution, and, of course, those ordinances and resolutions were upon the records of the municipality in *Evansville vs. Dennett* as well as in the present case. It is so in the case of every municipality. There is nothing peculiar in this respect in the present case, but it stands on precisely the same footing as the case of *Evansville vs. Dennett.* The charter of the city of Evansville (Sess. Laws, Ind., 1847, p. 9, sec. 26 *et seq.*), which was in force, and which

applied in respect to the proceedings for the issue of the bonds there in question, as well as for other corporate proceedings, provided:

"The common council shall keep a full and fair record of all their proceedings. * * * The Clerk shall attend all meetings of the council, and make and keep a record of their proceedings. * * * It shall also be the duty of the clerk to safely keep and preserve all records, books, and papers belonging to the city of Evansville, and appertaining to or deposited in his office, entire and without injury or mutilation, and to hand them over, together with all other property of said city in his hands, to his successor. * * * This act shall be deemed and taken to be a public act, and as such may be read as evidence in any court, without being pleaded or particularly referred to in pleading; * * * and transcripts of the records and proceedings of the said common council, certified by the mayor, under the corporate seal, shall be evidence in all courts," &c.

In all this there was nothing peculiar either to the city of Evansville or to the city of Santa Cruz. Substantially these provisions as to the keeping of records of proceedings are true of every municipality, and it is also true that such municipalities can only act by order, ordinance or resolution. The fact referred to by Circuit Judge Ross in giving the opinion of the two Judges of the Circuit Court of Appeals in the present case is that "such ordinance was a part of the public records of the city, which by its charter are required to be kept in 'large, well-bound, uniform and suitable books.'" This, as we have seen, was equally true in the case of *Evansville vs. Dennett*, as in the case of every other municipality. We refer to the language of the court on this point, because it shows the fundamental error which led to the decision of the Court of Appeals in the present case.

Negotiable municipal bonds payable to bearer are transferable by delivery, and a purchaser of them on general principles is not bound to examine the ordinances and proceedings under which they are issued. They are negotiable, and are not subject to any defense that certain facts existed outside of the bonds themselves which constitute a defense to them, except the want of statute authority to issue bonds. Such negotiable bonds are designed to pass and do pass from hand to hand by delivery. Savings banks and other banks and trust companies and individuals purchase the same or lend money on the same on the delivery of the bonds to them, and they do this relying on the protection which their negotiable character gives to them. Thus, the 18 or 20 banks, trust companies or individuals who were the purchasers of the refunding bonds involved in the present case acquired the same relying upon their negotiable character.

For a court to hold that such bonds are non-negotiable, and that any bank, trust company or other purchaser must examine all the records of the municipalities issuing them would be to upset the universal course of dealing in these securities by all the saving banks and moneyed institutions in the country to the prejudice of the municipalities as well as the investors. The far-reaching effect of any such decision is obvious. It would prevent the municipalities which rely upon the sale of such securities for the means of making permanent improvement, such, for example, as acquiring water works as in the present case, from making advantageous sales of such bonds, and would generally prevent the dealing in them by savings banks and other institutions which have money to invest or lend, because they would never buy or deal in non-negotiable paper

on any such conditions. Of course, it is competent for the constitution or statutes of a State expressly to provide that municipal bonds shall not be negotiable, but shall be open to every defense to which a non-negotiable obligation would be subject, but it is easy to see why they do not so provide. Thus, Mr. Justice HARLAN states in the recent case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255:

> "Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But for reasons that every one understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Not only are negotiable municipal bonds generally not open to any such defense as that attempted to be raised in the present case, but especially is it true when the bonds, as do the present bonds, recite specifically the truth of the very fact the falsity of which is attempted to be set up as a defense. The statute of California now in question authorizes the issue by a city of refunding bonds to refund "*outstanding indebtedness evidenced by bonds thereof.*" The bonds in suit expressly recite that they are "issued by the city of Santa Cruz *for the purpose of refunding bonded indebtedness of said city*," and this express recital estops the municipality from showing the contrary—namely, showing that the bonded indebtedness which is refunded is not the bonded indebtedness of the city.

This court in the case of *Evansville vs. Dennett* answered in the affirmative the following question certified by the Circuit Court of Appeals:

"3. Do the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company, [*i. e.*, that the bonds are issued "by virtue of an act" conferring upon the city the power to subscribe for stock and issue bonds] as against a *bona fide* purchaser for value of such bonds, estop the city of Evansville from asserting that such bonds were not issued, for stock subscribed, upon a petition of two-thirds of the resident freeholders of the city, distinctly setting forth the company in which stock was to be taken, and the number and amount of shares to be subscribed?"

And this court also in said case answered in the affirmative the last clause of the fifth question; namely:

"Or had such a purchaser the right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds?"

See further in regard to *Evansville vs. Dennett*, the brief hereto attached, p. 14 *et seq.*

Not only was this decision rendered in the *Evansville case*, but in the case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255, this court unanimously held that the express recital in the bonds of Gunnison county that they did not exceed in amount the limit prescribed by the constitution of the State of Colorado estopped the county from showing by its records or other facts outside of the bonds themselves that the bonds themselves were in excess of the limit. In that case also it was urged by the defendant county that the county was obliged to keep records which were public and open to all purchasers of bonds, and these records were introduced in evidence before the trial court as showing that the bonds had been issued in excess of the constitutional limit, and that they were therefore void. This court

held that such admission of these records was error, and that the county was estopped by the recital in the bonds from making any such defense, although the records, if consulted, might have shown the illegality of the bonds in this respect.

Gunnison County Case also a Controlling Authority for the Petitioner in this Case.

We ask particular attention to the *Gunnison County case*, among other reasons, because it came before this Court on a writ of *certiorari* issued to the Circuit Court of Appeals for the Eighth Circuit. This Court considered the question involved in the *Gunnison County case* of such great importance that it issued its writ of *certiorari*, to bring the case before this Court for review. The same question precisely is involved in the present case, and is the one on which the present case was decided by both the Circuit Court and the Circuit Court of Appeals, and on which in the present case the Judges in the Ninth Circuit are evenly divided. The *Gunnison County case* involved especially the question whether the purchaser of municipal bonds was bound to notice the records of the municipality pertaining to the issue of such bonds. Additional time was allowed to counsel, and the case was, as this Court will recall, argued with great ability in behalf of the county by Governor THOMAS, of Colorado, and other counsel, and the question upon which the Court of Appeals made the decision of the present case turn was thoroughly discussed by counsel and fully and carefully considered by this Court in the said *Gunnison County case*, all of which will appear by the

reference to that case in the Brief hereto attached, on pages 28 to 32, to which, without repeating here the arguments, we respectfully, but earnestly, ask the attention of this Court, as we insist that the decision in this case by the Circuit Court of Appeals is directly in the teeth of the *Gunnison County case*, as well as in the case of *Evansville vs. Dennett.* These cases laid down, indeed, no new doctrine, for the same principle had been laid down by this Court, under facts substantially the same, in *Hackett vs. Ottawa*, next to be cited, and that case, in its turn, as will be seen by the opinion of Mr. Justice HARLAN, follows in its application the principle of previous cases in this Court.

Hackett vs. Ottawa also in Point for the Petitioner.

The case of *Hackett vs. Ottawa*, 99 U. S., 86, unanimously decided by this court, Mr. Justice HARLAN delivering the opinion, is precisely in point. That case involved the validity of certain negotiable bonds issued by the city of Ottawa, Illinois. Under the charter of the city and the constitution of the State there was power to issue bonds for corporate purposes of the city. The bonds in question which had been issued by the city recited, among other things, that they were issued (p. 86) "by virtue of the charter of said city," also "in accordance with a certain ordinance passed by the city council of said city on the 15th day of June, A. D. 1869, entitled 'An ordinance to provide for a loan for municipal purposes,' which ordinance was ratified by a majority of all the qualified voters of said city at an election holden on the 20th day of July, A. D. 1869, and in conformity with an ordinance passed by the city coun-

cil of said city on the 30th day of July, 1869, entitled 'An ordinance to carry into effect the ordinance of June 15, 1869, entitled "An ordinance to provide for a loan for municipal purposes."'" The defendant pleaded as a defense to the said bonds that they were in fact issued and donated to one Cushman or the Ottawa Manufacturing Company, and that they were not issued for any municipal purpose whatever, and it was claimed that these facts appeared from the ordinance whose date and title were given on the face of the bonds. This court however, held that no such defense could be made as against the *bona fide* holder of the said bonds. Mr. Justice HARLAN, giving the opinion of the court, says (pp. 90, 91):

"The bonds in suit upon their face import: 1st, That the faith of the city is irrevocably pledged for their payment. 2d, That they were issued in pursuance of the power which the council possessed to borrow money on the credit of the city and issue bonds therefor, and also in accordance with certain ordinances which provided for a loan for *municipal* purposes. The recitals of the bonds, in themselves, furnish no ground whatever to suppose that the council transcended its authority, or issued them for other than such purposes. They justify the opposite conclusion.

"The city, however, claims that they were not issued for municipal purposes, but as a simple donation to a private corporation, formed for business ends solely, and in no wise connected with or under the control of the city,—all of which, it is further claimed, appears from the ordinances, whose date and title are given in the face of the bonds.

"The ordinance of June 15, 1869, authorizes the mayor to borrow, in the name, for the use, and upon the bonds of the city, the sum of $60,000, 'to be expended in developing the natural advantages of the city for manufacturing purposes.' * * * The ordinance of July 30, 1869, was to carry into effect that of June 15, 1869. It directed the mayor to deliver the bonds to one Cushman, 'to be used by him in develop-

ing the natural resources of the surroundings of the city, and that the said Cushman is authorized and directed to expend the sum in the improvement of the water-power upon the Illinois and Fox Rivers within the city and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose, in the manner which, in his judgment, shall best secure the practical and permanent use of said water-power in the city and its immediate vicinity.'"

It was contended, among other things, by the holders of the bonds that these were proper corporate purposes of the city. This court, however, did not decide that question, Mr. Justice HARLAN saying (pp. 95, 96):

"But a direct decision of that question does not seem to be essential to the disposition of this case. We content ourselves with stating the propositions which counsel have urged upon our consideration, and without expressing any settled opinion as to what are corporate purposes within the meaning of the Illinois constitution, we pass to another point, which, in our judgment, is fatal to the defense. It is consistent with the pleas filed by the city that the testator of plaintiffs in error purchased the bonds before maturity for a valuable consideration, without any notice of want of authority in the city to issue them, and without any information as to the objects to which their proceeds were to be applied, beyond that furnished by the recited titles of the ordinances. For all corporate purposes, as we have seen, the council, if so instructed by a majority of voters attending at an election for that purpose, had undoubted authority, under the charter of the city, to borrow money upon its credit and to issue bonds therefor. The bonds in suit, by their recitals of the titles of the ordinances under which they were issued, in effect, assured the purchaser that they were to be used for *municipal* purposes, with the previous sanction, duly given, of a majority of the legal voters of the city. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard by reason of the

representation, upon the face of the bonds, that the ordinances under which they were issued were ordinances 'providing for a loan for municipal purposes.' Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially, a declaration by the city with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is therefore estopped, by its own representations, to say, as against a *bona fide* holder of the bonds, that they were not issued or used for municipal or corporate purposes. It can not now be heard, as against him to dispute their validity. Had the bonds, upon their face, made no reference whatever to the charter of the city, or recited only those provisions which empowered the council to borrow money upon the credit of the city and to issue bonds therefor, the liability of the city to him could not be questioned. Much less can it be questioned, in view of the additional recital in the bonds, that they were issued in pursuance of an ordinance providing for a loan for municipal purposes; that is, for purposes authorized by its charter. *Supervisors v. Schenck*, 5 Wall. 772. It would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued. Whether such representations were made inadvertently, or with the intention, by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case, the city, both upon principle and authority, is cut off from any such defense. What this court declared, through Mr. Justice CAMPBELL, in *Zabriskie v. Cleveland, Columbus & Cincinnati Railroad Co.*, (23 How. 381), as to a private corporation, and repeated, through Mr. Justice CLIFFORD, in *Bissell v. City of Jeffersonville* (24 *Id.* 287), as to a municipal corporation, may be reiterated as peculiarly applicable to this case: 'A corporation, quite as much as an

individual, is held to a careful adherence to truth in their dealings with mankind; and can not, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."

The charter of the city of Ottawa contains the usual provisions as to keeping, and publishing from time to time a journal of its proceedings, especially ordinances authorizing the issue of bonds, as will appear by extracts from the charter of that city, given in the foot note.*

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* ART. 2, SEC. 9. The city council shall keep a journal of its proceedings, and from time to time publish the same, and the yeas and nays, when demanded by any member present, shall be entered upon the journal.

ART. 5, SEC. 3. The city council shall have power * * * * * to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof.

ART. 5, SEC. 38. The city council shall have power to make all ordinances which shall be necessary and proper for carrying into execution the powers specified in this act, so that such ordinances be not repugnant to nor inconsistent with the constitution of the United States or this state.

ART. 5, SEC. 40. All ordinances passed by the city council shall, within one month after they have been passed, be published in some newspaper in the city, and shall not be in force, except as aforesaid, until they have been published as aforesaid.

ART. 5, SEC. 41. All ordinances of the city may [be] proven by the seal of the corporation, and when printed or published in book or pamphlet form, and purporting to be published by authority of the corporation as in force, the same shall be received in evidence in all courts and places without further proof.

ART. 10, SEC. 20. No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for, by a majority of the voters of said city, attending an election held for that purpose.

Charter of City of Ottawa, Session Laws, Illinois, 1853, p. 296.

Nothing Peculiar in this Case as to the Record to be Kept by the Municipality, or to take it out of the Established Doctrine of this Court.

As stated above Circuit Judge GILBERT gave a dissenting opinion in the present case (Record, p. 591), to which we call the special attention of this court, and which we submit is both on principle and authority conclusive in favor of the validity of these bonds. The learned Judge cites numerous cases of this court supporting his opinion. Among other things he says (Record, p. 599):

"In the latter case [*Evansville vs. Dennett*, 161 U. S., 434,] the bonds contained the recital that they were issued by virtue of a certain designated act of the legislature as well as by virtue of a resolution of the city council, ordering an election of the qualified voters of the city, which resulted in a legal majority in favor of such subscription. The court said: 'As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature.'"

We do not quote the whole of Judge GILBERT's opinion, but respectfully request this court to read it in its entirety. He says among other things (Record, p. 594):

"In the present case the opinion of the majority of the court seems to have been influenced by the fact that by the charter of the city of Santa Cruz a public

record of its ordinances is required to be kept in books accessible to the public, and by the further fact that the city officers who were impliedly authorized to issue the refunding bonds were not expressly empowered to make any certificate or representation to prospective purchasers in respect to the character of the indebtedness for the payment of which the refunding bonds were issued. As far as the first consideration is concerned, it is sufficient to say that the charters of all municipal corporations require similar public records of their proceedings, and that such was undoubtedly the case with the city of Ottawa; yet in *Hackett v. Ottawa*, the court deemed that fact immaterial to the question which was before it, held that a purchaser of bonds was not bound to inspect such records, and disposed of the case upon the general principles of estoppel applicable to all cases. Neither can any distinction between that case and the case at bar be predicated upon the fact that the act of March 1st, 1893, under which the refunding bonds of the city of Santa Cruz were issued conferred no express power upon the officers of the city to certify to any particular fact in connection with the proceedings on which the bonds were issued, or to make any recitals whatever upon the bonds. The proceedings were had under a statute that not only conferred authority to refund the bonded indebtedness but imposed a duty upon the city to determine whether the occasion had arisen to refund, and if so, to determine wherein the bonded indebtedness consisted, and the nature and amount thereof. Under this authority the city determined that the Water Company's bonds were a portion of its bonded debt, and as such subject to be refunded. The officers of the city of Santa Cruz who executed the refunding bonds were the officers whose duty it was to issue them. Before doing so they were obliged to determine for themselves that the antecedent steps had been taken which were indispensable to the issuance thereof, and they were empowered by an ordinance of the city to recite upon the bonds the facts usually recited upon such instruments—the facts upon which the purchaser was authorized to proceed and on which he might rely as was done in the Ottawa case. The bonds were executed under the seal of the city and were signed by the mayor and the city clerk. These were the officers whose duty it was to sign such instruments. Said the court in the *Town of Coloma v.*

Eaves, 92 U. S. 484, 488: 'At some time or other, it is to be ascertained whether the directions of the act have been followed; whether there was any popular vote; or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere, and once for all; and the only persons spoken of who have any duties to perform respecting the election, and action consequent upon it, are the town clerk and the supervisor or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended that those officers, or one of them at least, should determine whether the requirements of the act prior to a subscription to the stock of a railroad company had been met.' The bonds in question in the present case contain a recital that they were issued 'for the purpose of refunding the bonded indebtedness of said city,' in pursuance of the act of March 1st, 1893, 'and in pursuance of, and in conformity with, the constitution of the state of California, and the ordinances of the city of Santa Cruz, and in pursuance of, and in conformity with, a vote of more than two thirds of all the qualified electors of said city, etc.,' and contained the certificate, 'that all acts, conditions, and things required by law to be done precedent to, and in the issue of said bonds, have been properly done, happened and performed, in legal and due form, and as required by law.' Here is a distinct certificate that the bond was issued for the purpose of refunding the bonded indebtedness of the city. This recital was expressly authorized by an ordinance of the city before the bonds were issued."

The learned Judge thus states and shows, and we also show in this brief and in the brief hereto attached and made part hereof, that there *is nothing peculiar in the charter of Santa Cruz as to a public record of its ordinances being kept.* The same thing is true of every municipality, and has been true in all the numerous cases decided by this court, in regard to the effect of recitals in negotiable municipal bonds.

There is also *nothing peculiar* in this case of Santa

Cruz as to *an absence in the statute of express authority to make recitals.* In none of the numerous cases decided by this court has any *express* power to make recitals existed in the statutes under consideration. In *Bernards Township vs. Morrison*, 133 U. S. 523, 527, this court says:

"It is urged * * * that the statute does not in terms give them [*i. e.*, commissioners who were not even general officers of the township] authority to determine whether the preliminary conditions have been complied with; and that this case is, therefore, to be distinguished in these respects from those cases where similar recitals have been held conclusive. But though not the ordinary officers of the township, they were the ones to whom by legislative direction was given full authority in the matter of issuing bonds. * * * While it is true that the act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet such express direction and authority is seldom found in acts providing for the issuing of bonds."

This court accordingly held that such commissioners had power to make recitals, and that those recitals would estop the township.

The decision of the Circuit Court in the present case holding these bonds valid was cited with approval and followed by the United States Circuit Court of Appeals for the Seventh Circuit in *Wesson vs. Town of Mt. Vernon*, 98 Fed. Rep., 804, 810 (the same court also citing to the same effect *Gunnison County vs. Rollins*, 173 U. S., 255). The Circuit Courts of Appeals for the Seventh Circuit and the Ninth Circuit are thus diametrically opposed on the very point on which we ask this writ of *certoriari*.

In the *Gunnison case* just cited Governor THOMAS insisted in argument that there could be no estoppel by recital as against a *constitutional* debt limit pro-

vision, but the Court held otherwise by its unanimous decision in that case. *A fortiori* the recitals in the bonds in the present case are binding where the only defect alleged is one supposed to arise in the detail of carrying out the provisions of the enabling statute.

The plaintiff was the bona fide holder of these bonds and entitled to maintain this suit upon them.

A *bona fide* holder is a purchaser for value without notice, or the successor of one who was such purchaser (*McClure vs. Oxford Township*, 94 U. S., 429). These bonds and the coupons are payable to bearer and transferable by delivery, and may be sued upon by the bearer. As the previous holders of the bonds in suit were *bona fide* holders for value (Findings of Court, Record, p. 44), the plaintiff can avail himself of such previous holders' position without showing that he himself has paid value (*Montclair vs. Ramsdell*, 107 U. S., 147).

It is no objection to the maintenance of this action that the plaintiff did not pay any money consideration for the assignment to him of any of the said bonds or coupons, but all said bonds and coupons were assigned to plaintiff for collection only, for all the holders of these bonds were non-residents and not citizens of the State of California. On this point see the case of *Bernards Township vs. Stebbins*, 109 U. S., 341, in which case certain citizens of New Jersey, New York and Pennsylvania had delivered bonds and coupons to the plaintiff (p. 347) "*solely for the purpose of bringing suit*" on the same. This court held that so far as

respects the coupons or bonds owned by the citizens of such States other than the State of New Jersey the suit could be maintained in the Federal court but could not be maintained as respects the bonds or coupons owned by the citizens of the State of New Jersey, of which State the defendant was a citizen. The court on this point said (p. 356):

"But no valid objection has been shown to the maintenance of these bills, so far as regards those bonds of which the plaintiffs are the bearers, and which are actually owned, either by themselves, or by other citizens of New York or Pennsylvania, to a sufficient amount by each owner to sustain the jurisdiction of the circuit court" (citing numerous cases).

Accordingly, in the present case, both the Circuit Court and also the Circuit Court of Appeals held that the Federal court had jurisdiction.

Of course, if the Federal court had not jurisdiction of the case, then the proper judgment of the Circuit Court of Appeals would not have been to reverse the cause with direction to enter judgment for the defendant, as was done in the present case (Record, p. 602), but to reverse the cause with direction to dismiss the action, so that any judgment would not be an estoppel. And in this view the judgment of the Circuit Court of Appeals would be clearly erroneous and should be reversed.

The Annexed Brief.

We annex to this brief as a part hereof a printed copy of the brief filed by us in the United States Circuit Court of Appeals, on petition for rehearing in this case, and respectfully ask the attention of this court to the arguments therein stated at length.

It is entirely applicable on the present application, and it states our points and views as clearly as we are able to present them.

We call the special attention of the court, among other things, to POINT II. of the said brief, at page 53, namely, that, inasmuch as the city of Santa Cruz had purchased the plant of the water company, subject to the mortgage securing the $89,000 of bonds of said company, assuming and agreeing to pay the said bonds, therefore these bonds were an "outstanding indebtedness of the city of Santa Cruz, evidenced by bonds," within the meaning of the act of March 1, 1893, authorizing the issue of refunding bonds.

Conclusion.

In conclusion, we respectfully submit to this court that the views which are stated by the Circuit Court of Appeals as the ground, and the *only* ground for its decision in the present case, namely, that the *bona fide* holder of a negotiable municipal bond, payable to bearer and transferrable by delivery, is put upon notice of what is contained in the books of records of proceedings of the municipality issuing the bonds, would overturn the whole doctrine of negotiable municipal bonds. They would no longer be negotiable according to the law merchant; that is, transferrable by delivery, and be protected in the hands of the purchaser against any equities and defenses not appearing upon their face, but they would, in substance and effect, be reduced to the quality of instruments non-negotiable according to the law merchant. Any such doctrine is, as we have shown in this brief and in the accompanying brief, directly contrary to the numerous decisions of

this court, and especially to the decisions in the cases of *Hackett vs. Ottawa*, *Evansville vs. Dennett*, *Gunnison County vs. Rollins*, and the other cases referred to in the annexed brief.

These bonds, as appears by the record in this case, had been regularly issued by the city, voted for by the electors, executed and delivered by the city, and had passed into the hands of about a score of purchasers for value—savings banks, national banks, trust companies and other purchasers, and investors and lenders on negotiable paper—in the regular course of business. The decision of the Circuit Court of Appeals in the present case is to the effect that all these numerous holders of these bonds and coupons must lose their money because they did not each one, before lending any money on these negotiable bonds containing the recital that they were issued to refund bonded indebtedness of the city of Santa Cruz, make a journey across the continent and examine for themselves the records and books of the city of Santa Cruz—for what? For the purpose of finding evidence to contradict the express recital in the bonds that they are issued "to refund the bonded indebtedness of said city." The impracticability, not to say anything of the gross injustice of any such doctrine, is obvious. It is not the doctrine of this court, and the decision of the Circuit Court of Appeals should be reviewed by this court on *certiorari*, and that decision should be reversed.

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